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Supreme Court of the United States

October 1961 Term

No. 911

WILLIAM G. SOLER,

Petitioner,

v.

BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

OSMOND K. FRAENKEL;
A. HARRY LEVITAN,
Attorneys for Petitioner,
120 Broadway,
New York 5, N. Y.

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the final judgment of the Supreme Court of Pennsylvania which upheld petitioner's dismissal from the Philadelphia school system.

The Opinion Below

The opinion of the Supreme Court of Pennsylvania is reported in 406 Pa. 468 and 176 A. 2d 653. A copy is hereto annexed in Appendix A (*infra*, pp. 15-30).

The Grounds of Jurisdiction

(i) The judgment sought to be reviewed was dated and entered on December 29, 1961.

(ii) A petition for rehearing was entertained by the Supreme Court of Pennsylvania and denied on February 6, 1962.

(iii) Jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

Questions Presented for Review

1. Whether the dismissal of a school teacher for alleged incompetence resting entirely on his refusal to answer questions about possible Communist connections is consonant with due process when the teacher was not notified of the authority under which he was being questioned or warned that refusal to answer would be deemed evidence of incompetence or might result in dismissal.

2. Whether the dismissal of a school teacher is consonant with due process where the decision of the school board rested, without distinction, on alleged incompetence and on the teacher's plea of self-incrimination before a Congressional committee.

3. Whether the dismissal of a school teacher for alleged incompetence is consonant with due process when it rested only on the teacher's statement that he would not answer questions about possible Communist connections unless given an opportunity to consult counsel about them.

4. Whether the dismissal of a school teacher for alleged incompetence can be sustained when actually motivated by the teacher's plea of self-incrimination before a Congressional committee.

5. Whether *Beilan* v. *Board of Public Education*, 357 U. S. 399, should not be overruled.

Constitutional and Statutory Provisions Involved

Only the citations of the constitutional and statutory provisions are included here. The full text is printed in Appendix B hereto (*infra*, pp. 31-33). The citations are as follows:

Due Process Clause
U. S. C., Const. Amendment 14.

Teachers' Tenure Act
Act of 1949, March 10, P. L. 30, art. XI, §§ 1122, 1132(b); 1949, May 9, P. L. 939, § 4; 24 Purdon's Pa. Stat. Ann. §§ 11-1122, 11-1132(b).

Pennsylvania Loyalty Act
Act of 1951, Dec. 22, P. L. 1726, §§ 6, 7, 10; 65 Purdon's Pa. Stat. Ann. §§ 216, 217.

Statement of the Case

Petitioner had served as a teacher of English in the Philadelphia school system from 1929 until his dismissal in 1954 (65a).* On May 28, 1953, he was called to the office of the Superintendent of Schools. He was told he would be questioned about his loyalty (7a, 60a, 61a) and asked if he had been an active Communist in January 1952 (7a). After obtaining an opportunity to consult counsel (7a, 8a), he came back on June 19, 1953 and stated that he was not a member of the Communist Party in January 1952 (8a). According to Dr. Hoyer, the Superintendent, he then said "he could not answer any similar questions unless I would provide him with the questions so that he could take them to counsel for his consideration" (8a). This Dr. Hoyer refused to do and that ended the interview without any questions having been asked (8a, 9a). No charges were preferred against petitioner at that time (50a). Up to this time petitioner's ratings by his principal had been satisfactory, the last of these having

* References are to folios of the printed Appendix.

been dated June 26, 1953 (48a, Soler Exh. 2, 106a). And he continued to teach until November 20, 1953 (50a).

On November 17, 1953 petitioner was called before the Un-American Activities Committee (14a). The transcript of the hearing (read into the record at the School Board hearing, 12a-26a) shows that when asked about Communist Party membership he pleaded the Fifth Amendment (19a, 20a). Then, for the first time, a rating of unsatisfactory was given, dated November 20, 1953 and signed, not by petitioner's principal, but by the Superintendent, (see Board Exh. 1, 101a). On November 24, 1953 the Superintendent wrote petitioner summarizing the two interviews of May 28 and June 19, and stated that petitioner's refusal to answer questions showed "lack of professional fitness" and his "conduct" before the House Committee showed "lack of a sense of civil responsibility and public duty" (12a, 13a).

Formal charges were then preferred by the School Board (2a-4a). These, for the first time, referred to petitioner as "incompetent" (3a). These charges referred separately to the interviews with the Superintendent and the appearance before the House Committee as evidence of incompetency. A hearing on these charges was held on May 3, 1954 (5a-107a). On June 7, 1954 the Board adopted a resolution that the "charges" were sustained and that petitioner should be dismissed (109a). There was no separate finding with respect to either of the two aspects of the charges. This resolution was confirmed by the state Superintendent of Schools (110a-114a).

From the latter determination an appeal was taken, in accordance with Pennsylvania law, to the Court of Common Pleas (133a). That Court held (140a) the dismissal unjustified under Pennsylvania law on the ground that in cases dealing with loyalty the procedures specified in the Loyalty Act of 1951, P. L. 1726, were exclusive, relying on a statement in *Board of Public Education* v. *Intille*, 401 Pa. 1, 22 (137a). In the Court of Common Pleas the School Board had conceded

that the second ground for dismissal, to wit, the plea of the privilege before the Committee, was not tenable (133a, 134a). The Supreme Court of Pennsylvania, however, overruling its own statement in *Intille*, reversed and held that the refusal to answer the Superintendent justified dismissal for incompetence (*infra*, 15ff). One judge dissented (*infra*, 26ff).

The Manner in Which the Federal Questions Were Raised

On petitioner's appeal to the Court of Common Pleas he challenged his dismissal as a deprivation of due process in violation of the Fourteenth Amendment. The pertinent portions of the appeal are set forth in Appendix C (*infra*, pp. 34, 35).

The Court of Common Pleas did not deal with the constitutional issues since, basing itself on the state Supreme Court's decision in *Intille, supra*, it set aside the dismissal for failure to comply with state law. Consequently the appeal to the state Supreme Court dealt only with that subject and the majority opinion contained no reference to any constitutional issue. But the dissent referred to "due process of law" and a "rigid adherence" to the federal constitution (R. 31). However, after the decision by the state Supreme Court petitioner filed a petition for rehearing which specifically raised the constitutional issues here embraced in the "Questions Presented for Review" (R. 9-14). That petition was entertained by the state court, though denied without opinion (R. 15).

In his petition for rehearing petitioner pointed out that the constitutional issues had not previously been presented to the state Supreme Court "because they were unnecessary to a determination of the issues framed by the decision of the Court below" (R. 10). Thereupon, petitioner raised three federal constitutional issues (R. 10-14) as set forth in Appendix D (*infra*, p. 36).

Reasons for Granting the Writ

1. The decision of the court below is at variance with this Court's holdings in *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 366 U. S. 36, and *Beilan* v. *Board of Public Education*, 357 U. S. 399, in that in each of those cases this Court stressed the need for proper notice or warning antecedent to action for failure to answer questions.

2. The decision of the court below is at variance with this Court's decisions in *Stromberg* v. *California*, 283 U. S. 359, *Williams* v. *North Carolina*, 317 U. S. 287, *Cramer* v. *United States*, 325 U. S. 1, 36, n. 45, and *Yates* v. *United States*, 354 U. S. 298, in that a dismissal resting on two grounds has been sustained, although the second of these should not have been considered and there is nothing in the record to indicate whether the School Board would have dismissed had only the first of these been considered by it.

3. The decision of the court below that petitioner was not entitled to the advice of counsel of his own choice raises a far-reaching constitutional issue of great public importance which should be, and has not been, passed upon by this Court.

4, 5. The decision of this Court in *Beilan*, *supra*, in effect upheld a dismissal for alleged incompetency which actually resulted from the teacher's plea of his privilege before a Congressional committee. We respectfully suggest that the decision was wrong, that the views of the dissenting justices are correct, and that the case should be overruled.

1. The Superintendent of Schools proposed to interrogate petitioner about his loyalty to the government of the United States (7a, 60a, 61a). The purpose of the inquiry was to determine whether his lack of loyalty was such as to adversely affect his contractual right to be retained as a school teacher (3a). Petitioner could, therefore, reasonably conclude that the authority under which the Superintendent

proposed to question him was the Pennsylvania Loyalty Act of 1951. That this was indeed a reasonable conclusion is seen by the declaration of the Pennsylvania Supreme Court in *Board of Public Education* v. *Intille*, 401 Pa., 1, 22, 23; *Board of Public Education* v. *Watson*, 401 Pa. 62, and by the decisions of the Courts of Common Pleas of Philadelphia County in this case and in the *Beilan* case. But, under that Act, a refusal to answer questions could, at most, result in a proceeding instituted to determine whether petitioner was a "subversive person" as defined by that Act. For nowhere did that Act suggest that a refusal to answer, without more, was punishable by dismissable (see *infra*, pp. 31-33).

At the same time, petitioner, having tenure and [illegible] subject to dismissal under the specific grounds of the Public School Code of 1949, might have assumed that the inquiry related to his professional fitness, or "incompetency", as set forth in that Code (see *infra*, p. 31). But once again, that Code nowhere suggested that a refusal to answer without more, was proof of incompetency.

Petitioner, consequently, was totally unaware under what specific authority the Superintendent was inquiring and had no idea that he was running any risk of dismissal in refusing to answer the questions. The Superintendent gave ~~appellant~~ petitioner no reason to believe that the refusal to answer would lead to dismissal, either under the Loyalty Act or under the School Code. Given the statutory scheme which confronted petitioner and the resulting uncertainty of petitioner's position under either or both Acts regardless of his response to the questions, we suggest that petitioner's loss of tenure, position, livelihood and status, for failure to answer, was without due process of law.

The *Beilan* case, 386 Pa. 82, did of course later hold that the questions were put under the Public School Code of 1949 and that the failure to answer was incompetency. But the total lack of proper notice and warning must be determined as of the time the inquiry was conducted, and cannot be cured by a subsequent holding of a state court.

Moreover, in *Beilan* there was, as this Court noted in upholding the dismissal (357 U. S. at 408), a specific warning of the possibility of dismissal for refusal to answer, a warning wholly absent here. We submit such absence is sheer denial of due process.

In the first *Konigsberg* case, 353 U. S. 252, this Court (at 259 and note 12) set aside denial of admission to the bar, based on alleged lack of good character, and pointed out that there had been no intimation that petitioner would be denied such membership merely because of his failure to answer. And in the second case, 366 U. S. 36, the later action of the examiners was upheld expressly on the ground that there had been adequate warning of the consequences of the refusal to answer (at 48). There the Chairman of the Committee expressly stated, at the later hearing, that failure to answer "would obstruct our investigation and result in our failure to certify you."

Here, on the other hand, there was no such warning. There was not even a statement that failure to answer would be considered evidence of incompetency. All that the Superintendent did was to tell petitioner that "my future course of action would be determined by the results of the conference" (8a). That was no more than the remarks by committee members in *Konigsberg* that the failure to answer "would have some bearing" on the ultimate determination—which this Court found insufficient warning (353 U. S. at 259, n. 12).

We submit, therefore, that there was a total absence of notice or warning. This absence is particularly significant because of the fact that the inquiry was in the area of loyalty and that Pennsylvania had prescribed special procedures for dealing with such an issue. A teacher asked questions of this kind might well have thought that he was running the risk of loyalty charges which he would be willing to run, believing he could vindicate himself. That such belief was not unreasonable is evidenced by the decisions of the Court of Common Pleas in *Beilan* and in this very case as well as by

the state Supreme Court's decision in *Intille*, *supra*. Certainly there is nothing in this record to justify any inference that petitioner was aware that he was going to be charged with incompetence and might be subject to dismissal. Under such circumstances the dismissal was a denial of due process.

The issue is of the greatest importance to all public servants and warrants full consideration by this Court.

2. The determination here being questioned was made in the first instance by a lay board on the basis of two distinct charges, one involving refusal to answer the Superintendent, the other based on a plea of self-incrimination before a Congressional Committee (3a). The record shows no separate vote taken by the Board on either charge, with respect either to guilt or punishment (109a).

It is clear, of course, that the dismissal could not be sustained on the second charge: *Slochower* v. *Board of Higher Education*, 350 U. S. 551. That has, indeed, been recognized by the courts of Pennsylvania: *Board of Public Education* v. *Intille*, *supra*; *Board of Public Education* v. *Watson*, *supra*, that in the instant case the Board conceded in the Court of Common Pleas that "the second ground for dismissal is no longer tenable" (134a).

We contend that in line with the *Stromberg* and other cases cited above the Board's determination cannot stand. In those cases jury verdicts were set aside because no one could determine whether or not the verdicts rested on a ground which this Court held had been improperly considered. So here no one can tell whether the Board's action rested on the second ground which it had no right to consider. We believe that the principle applicable to juries is equally applicable to lay agencies such as Boards of Education.

We recognize, of course, that the same contention was advanced in *Beilan* and rejected by the majority of the Court (357 U. S. at 402, note 3), though stressed by the Chief Justice in his dissent (id. 412)—a dissent concurred in by

Justices Black and Douglas. But we respectfully submit that the decision of the majority rested on a misconception of the applicable state law and that in any case it is wrong and should be overruled.

The basis for the majority's position in *Beilan* appears to have been that the ultimate determination of guilt on a valid ground was made by the Court of Common Pleas because, under the Pennsylvania statute, it exercises "de novo" review of dismissals. There are, however, two fallacies in that argument. In the first place, the Court of Common Pleas can exercise "de novo" jurisdiction only at the instance of the dismissed teacher. The statute, 24 Purdon 11-1132(b), states with respect to the appeal to that Court: "If the professional employee aggrieved shall so request in his petition, such hearing shall be de novo" (see *infra*, p. 33). In such a case the Court of Common Pleas acts independently of the Board of Education and must make findings of fact of its own, and so procedural errors before the Board are irrelevant. *Strick* v. *School District*, 141 Pa. Super. 246, 14 A. 2d 898; *Lane's Appeal*, 141 Pa. Super. 259, 14 A. 2d 573. But neither here, nor in *Beilan*, did the teacher request a de novo hearing, nor was one held.

In the second place, and more important, in both *Beilan* and the case at bar the Court of Common Pleas set aside the dismisgal. There was, therefore, no finding by that Court that a dismissal had been justified on the only possibly valid ground, no participation by the Court in the dismissal. So there is no reason why the general rule of *Stromberg*, et al. should be disregarded.

Perhaps a word should be added about this Court's statement (n. 3 at 402) that "A dismissal can be sustained if the Court finds support for any one of the multiple grounds relied upon by the dismissing school board," with the citation of the *Brown* case, 151 Pa. Super. 522, 30 A. 2d 726, aff'd. 347 Pa. 418, 32 A. 2d 565. In that case the dismissal had been set aside by the state Superintendent. The Common Pleas had upheld him. On an appeal by the board the Supe-

rior Court reversed and the Supreme Court affirmed. The only issue was whether or not ill health constituted ground for dismissal for incompetency. There was no contention, as here and in *Beilan*, that the school board had voted to dismiss on the basis of any matter it was not competent to consider.

We suggest, therefore, that this Court's statement in *Beilan* should be overruled and the general rule applied. Surely the issue is an important one and is of general interest in connection with the proceedings of lay boards.

3. In considering the extent to which a person in the situation in which petitioner found himself is entitled to the assistance of counsel, it is important to keep certain matters in mind. Pennsylvania's Loyalty Act required petitioner to file an oath with respect to his then current membership in the Communist Party (P. L. 1726 of Dec. 22, 1951). Petitioner had filed such an oath, denying membership as of its date, March 7, 1952 (18a, 67a). Thus when, at the first interview, petitioner was asked about membership just prior to that, namely, in January 1952 (7a), he quite naturally was concerned, especially as Dr. Hoyer told him that he had information that petitioner was a Communist as late as May 1952 (67a). It was natural, therefore, that petitioner should feel that his loyalty was being inquired into.

Petitioner then consulted counsel with reference to the only question asked at the first interview and then answered that question (8a). At the second interview no new questions were actually asked, but petitioner requested that the general tenor of further questions be indicated so that he could consult counsel about them (8a, 68a), and this was refused (8a, 68a). It is important to note that the Superintendent was accompanied by the board's attorney (29a, 30a).

The Court of Common Pleas on the basis of the foregoing ruled that petitioner's second request to consult counsel was reasonable—that indeed it could not "realistically" be said that petitioner had refused to answer at all (140a).

In the Supreme Court the issue of counsel was brushed aside by the statement that petitioner was not on trial but was merely being "questioned by his employer to determine his competency" (R. 26)—ignoring the fact that at no time did the Superintendent in any way intimate to petitioner that his competency, as distinguished from his loyalty, was in issue.

On the reasonable assumption that loyalty was the issue petitioner quite properly would be concerned with the implications and consequences of answers which he might give. It was concern over these matters which prompted his plea of the privilege before the House Committee (20a, 21a, 25a). That plea, of course, was not available to him before the Superintendent.* He might well be troubled, however, over the extent to which answers he might give to questions could be used against him in other proceedings and, since he was not entitled to have counsel appear with him before the Superintendent (37a), he at least wanted the right to consult counsel outside the Superintendent's office.

Due process should require that a person faced with the delicate situation in which petitioner found himself should have the benefit of legal advice before he can be dismissed for failure to answer questions that were not even asked and in the absence of any warning that such failure would be considered either evidence of incompetency or ground for dismissal.

This Court has never had occasion to consider the precise extent to which a person may be denied access to counsel of his own choice in a situation other than a criminal trial. That he is entitled to such protection in a state criminal case is, of course, clear: *Chandler* v. *Fretag*, 348 U. S. 3, cited with approval in *In Re Groban*, 352 U. S. 330, 332; *Reynolds* v. *Cochran*, 365 U. S. 525.

* Even if such a plea could have been interposed it would probably have resulted in charges and dismissal—a dismissal this Court might have sustained under *Cohen* v. *Hurley*, 366 U. S. 117.

Groban grew out of Ohio's statute which authorized a fire marshall to conduct an investigation. This Court, by a vote of 5 to 4, upheld the exclusion of counsel on the ground that the proceeding was an investigation, not a prosecution, and that the witness could plead his privilege against self-incrimination. That safeguard was, however, not available to petitioner when questioned by the Superintendent. The spirit underlying the *Groban* decision would seem to call for a holding in the case at bar that the continued assistance of counsel was petitioner's right. It is evident that the matter is of great importance and will often arise. It is an issue which should be resolved by this Court.

4, 5. In *Beilan* three of the four dissenters (Justices Black, Douglas and Brennan) in effect held that there was no basis for a finding either of incompetence or of disloyalty by reason of the refusal to answer. The Chief Justice did not reach that point, having dissented on a different ground (the one we have raised in paragraph 2 *supra*). We respectfully submit that these are sound positions which should lead to a reconsideration of *Beilan*. They are particularly appropriate since it is clear that both here and in *Beilan* the dismissals were actually motivated by the fact that the teachers had pleaded their privilege before a Congressional Committee. In both cases the refusal to answer had taken place many months before any steps were taken looking to dismissal, nothing, indeed, was done until after the appearances before the Committee, and charges were then immediately filed.

CONCLUSION

We respectfully urge that the writ be granted.

Respectfully submitted,

OSMOND K. FRAENKEL,
A. HARRY LEVITAN,
Attorneys for Petitioner.

Appendix A

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. 472

BOARD OF PUBLIC EDUCATION,
SCHOOL DISTRICT OF PHILADELPHIA,
Appellant,

v.

WILLIAM G. SOLER

January Term, 1961

Appeal from the Judgment of the Court of Common Pleas No. 1 of the County of Philadelphia, at No. 7939 December Term, 1954.

Opinion of the Court

BELL, *C.J.*

Filed: December 29, 1961

The facts in this case are not in dispute and may be thus summarized: On May 28, 1953, appellee-Soler, a teacher in Philadelphia Public Schools, was called to the office of Dr. Hoyer, Superintendent of Schools, and was informed that Dr. Hoyer had certain information in his possession which had an important bearing upon appellee's loyalty, and that Dr. Hoyer would like to ask appellee some questions with respect to this. Appellee then asked Dr. Hoyer to give him a list or statement of the proposed questions since he desired

to consult his attorney before deciding whether to answer them. Dr. Hoyer thereupon gave him a sample question to take back to his attorney. That question was whether appellee had been an active Communist in January of 1952.

A second interview between Dr. Hoyer and appellee took place at Dr. Hoyer's office on June 19, 1953. At this interview appellee answered in the negative the sample question which had previously been submitted to him. Appellee further stated that before he would answer any similar questions he desired the opportunity to be supplied with the questions, so that he could again take them to his attorney for consultation. Dr. Hoyer refused to accede to his request, at which point *appellee refused to answer any further questions dealing with his alleged disloyalty.*

Because of this insubordinate conduct of appellee the Board of Public Education of the School District of Philadelphia, after a hearing at which appellee was present and represented by counsel, dismissed the appellee on the grounds of "incompetency." The Superintendent of Public Instruction of the Commonwealth of Pennsylvania affirmed the decision of the Board. Appellee appealed to the Court of Common Pleas No. 1 of Philadelphia County which reversed the decision and set aside the discharge (dismissal) of the teacher. The Board thereupon took this appeal.

The lower Court correctly posed the issues when it declared: "There are basically two legal issues involved in this case. The first is whether or not a school teacher can be discharged for incompetency on the ground that he refused to answer questions dealing with his loyalty, propounded to him by the Superintendent of Schools. The second issue, assuming that the first should be answered in the affirmative, is whether or not appellant [here appellee] can be properly held to have refused to answer questions relating to his loyalty propounded to him by the Superintendent of Schools." The lower Court then went on to answer both issues in the negative.

Appendix A

Board of Public Education v. *Beilan*, 386 Pa. 82, affirmed 357 U. S. 399, clearly and specifically held that refusal by a teacher to answer questions as to the teacher's loyalty propounded by his administratitive superior is sufficient to render the teacher "incompetent" within the meaning of the tenure provisions of the Public School Code of 1949.* The Court said:

"We turn to the conclusion of the court below that the charges against appellee did not come within the grounds for dismissal set forth in the School Code of 1949, *supra*. Under the Act of May 18, 1911, as amended by the Act of June 20, 1939, P. L. 482, the grounds for dismissal of a teacher were 'immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, and persistent and wilful violation of the school laws of this Commonwealth'. . . . If the appellee had been charged with being a subversive it may be conceded that the Loyalty Act [often called the Pechan Act] should have been employed, but this was not the charge. *Appellee was charged with incompetency based on his refusal to respond to a pertinent inquiry as to his fitness to be a teacher.* The Loyalty Act preempted the field of dismissal for subversion as therein defined, but other causes of dismissal remained unaffected. Section 15 of the Loyalty Act expressly provides: 'The provisions of this act shall not affect the right to discharge any person for any cause other than those provided for by this act or without cause under existing law. . . .' Moreover the Loyalty Act provides neither the procedure nor the substantive law with respect to the duty of a teacher to answer proper questions. The provisions

* 24 P. S. § 11-1122 et seq.

The writer of the present opinion wrote a dissenting opinion in *Beilan* but his views were rejected by a majority of this Court. Having erected a signpost and approved a procedure for the Board to follow, this Court should be loath to now disapprove, disavow and destroy this signpost and procedure.

of the School Code do provide the basis for dismissal of a teacher who refuses to answer such questions.

"We have held that incompetency as a cause for dismissal is to be given a broad meaning. In Horosko v. Mount Pleasant Township School District *et al.*, 335 Pa. 369, 6 A. 2d 866, Mr. Justice LINN, speaking for the Court, at pp. 374-375 said: 'The term "incompetency" has a "common and approved usage." The context does not limit the meaning of the word to lack of substantive knowledge of the subjects to be taught. Common and approved usage give a much wider meaning. For example, in 31 C. J., with reference to a number of supporting decisions, it is defined: "A relative term without technical meaning. It may be employed as meaning disqualification; inability; incapacity; lack of ability, legal qualifications, or fitness to discharge the required duty." In Black's Law Dictionary (3rd edition) page 945, and in Bouvier's Law Dictionary (3rd revision), p. 1528, it is defined as "Lack of ability or fitness to discharge the required duty." . . .

"Certainly a teacher who refuses to respond to a pertinent inquiry relative to his fitness to teach is not competent within the broad reach of that term, whether the inquiry concerns loyalty or any other proper subject of inquiry. Frankness and cooperation with an administrative superior bear directly upon a teacher's competency. They are as essential in one occupying a post of public trust and civic responsibility as academic qualifications. Can it be seriously argued that where the superintendent of schools has trustworthy information indicating that a teacher has an incurable communicable disease or that he is a peddler of narcotics or, as here, that he may entertain Communistic ideologies which could be transmitted to the youth in his care, that no inquiry can be made as to the fact and that the teacher is not required to respond? As well stated in the brief of counsel for the appellant: '. . . The Superintendent has the

power and the duty, whenever the facts indicate the need, to inquire into and reevaluate the fitness of a teacher.' Unquestionably there is a reciprocal duty on the part of the teacher to fully and frankly cooperate. He may not block such proper inquiry by secretiveness or concealment.

"In Adler *et al.* v. Board of Education of the City of New York, 342 U. S. 485, the majority opinion of the U. S. Supreme Court by Mr. Justice MINTON, upholding the constitutionality of the Feinberg Law which prohibits employment of members of subversive organizations in the public schools of the State of New York, stated at p. 493: '. . . A teacher works in a sensitive area in a schoolroom.' There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.'

"In the instant case the court characterized appellee's conduct as 'misguided secretiveness and lack of candor', which it said it did not condone. The secretiveness consisted of a deliberate and insubordinate refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness. Such conduct stamped him with incompetence as a professional employe in the public schools.

"The court below states that the Superintendent's query related to a political association alleged to have occurred eight years prior to the interview and that appellee's refusal to answer 'that question' was obviously not relevant to the issue of his present competency. The court overlooks the fact that appellee not only refused to answer the question put to him, but any similar questions. . . .

". . . Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present

and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment.

". . . much of the argument of counsel for appellee proceeds upon the unwarranted assumption that appellee was charged with subversion. . . . If appellee had been charged with subversion, his reliance upon the Fifth Amendment at the Congressional hearing would not have established his disloyalty. But the charge here was not disloyalty but incompetency, based on his refusal to respond to inquiry pertaining to his fitness.

". . . The Superintendent had the power, if not indeed the duty, to make the inquiry, and appellee had the duty to cooperate by answering freely and frankly. *His defiant conduct in refusing to respond justified his dismissal on the ground of incompetency.*"

The lower Court held that the later opinions of this Court in *Board of Public Education* v. *Intille*, 401 Pa. 1, and *Board of Public Education* v. *Watson*, 401 Pa. 62, overruled *Beilan*. This was error. *Beilan* involved questions propounded by the teacher's administrative superior, while in *Intille* and *Watson* the questions concerning the teacher's loyalty and his Communistic activities—which in each case the teacher refused to answer—were propounded by a Congressional investigating committee. That distinction between *Beilan* and the *Intille* and *Watson* cases clearly appeared throughout the Court's opinion. In the *Intille* case, the Court pertinently said:

"The three appellants (Angeline Intille, Thomas Deacon and Sadie T. Atkinson) were teachers in the public schools of Philadelphia until the Spring of 1954 when they were dismissed by the Board of Public Education of the School District on a charge of 'incompetency', preferred by Dr. Louis P. Hoyer, Superintendent of the Philadelphia public schools. In each case, the dismissal was based *solely* on the teacher's

refusal to answer certain questions *propounded by a Subcommittee** (also known as the Velde Committee) of the Un-American Activities Committee of the House of Representatives concerning the witness' alleged membership in and association with the Communist Party. . . .

". . . The Superintendent based his finding of incompetency solely upon the fact that the appellants had refused to answer questions asked them by the Congressional Committee in reliance on their pleas of privilege under the Fifth Amendment against self-incrimination.

". . . At no time did any of the appellants refuse to answer any question asked them by their administrative superior. . . .

"The three co-ordinate courts below each sustained the order of dismissal before it in the mistaken belief that the question involved was ruled adversely to the appellant's contention by this court's decision in *Board of Public Education School District of Philadelphia* v. *Beilan*, 386 Pa. 82, 125 A. 2d 327, aff'd 357 U. S. 399. The error in that conclusion is patent. What the Board of Education sought to accomplish in these cases goes far beyond anything that was either decided or implied by the opinion for this court in *Beilan*'s case. His adjudged incompetency resided exclusively in the fact that he had refused to answer questions of his administrative superior (Superintendent Hoyer) concerning matters deemed to have bearing on his qualifications as a teacher in the public schools of Philadelphia, and not that he had refused to answer questions of a Congressional Committee. *That such was the ratio decidendi in the Beilan case is not open to question.* . . .

"The appellee Board is well aware of the distinction between *Beilan* and the present cases. In the Board's brief on these appeals, it is stated that 'The present cases differ from the *Beilan* case in that the teacher's refusal to answer ques-

* Italics ours.

tions occurred before a Congressional Committee rather than before his administrative superior.' . . ."

Justice Cohen in his concurring opinion in the *Intille* case clearly set out the sole issue before the Court in that case: ". . . the only legal problem with which we are concerned and the only question briefed and orally argued on these appeals is whether a public school teacher is 'incompetent' if the sole evidence of his alleged incompetency *is that he availed himself of the privileges of the Federal Constitution in a Federal proceeding. This* has been answered most adequately by the opinion for the Court." * These cases, we repeat, hold that the refusal of a teacher to answer such *questions before a Congressional Committee* on the grounds of the First or Fifth Amendments to the Federal Constitution does not of itself render the teacher "incompetent". However, it is still the law of Pennsylvania that the refusal by a teacher to answer relevant questions concerning his loyalty *propounded by his administrative superior* is ground for a finding of incompetency under the tenure provisions of the Public School Code.

Appellee contends that since the questions dealt with his loyalty, the procedures provided for dismissal under the Pechan Act** are mandatory and exclusive. We repeat, appellee was not dismissed on the ground of disloyalty; he was dismised on the ground of incompetency because of insubordination and lack of frankness, candor and intellectual honesty. The fallacy of appellee's position is that he believes and contends that any question *pertaining to or within the area* of Communism or subversive activities or loyalty to our

* Thus any language in the *Intille* and *Watson* cases which fails to distinguish between the situation where the questions are propounded by an administrative superior and those situations where the questions are propounded by a Congressional Committee was dicta. To avoid any further confusion we disavow such dicta and limit the opinion in those cases to the questions which were there involved.

** 65 P. S. § 211 et seq.

Country is barred unless brought and propounded under the Pechan Act. That gives to the word "incompetent" too narrow and restricted a meaning, and to the Pechan Act too broad a meaning, and is specifically refuted by the Court's opinion in *Board of Education* v. *Beilan*, *supra*.

Mr. Justice Frankfurter's concurring opinion in *Beilan* v. *Board of Public Education*, 357 U. S. 399, further refutes appellee's contention when it declares at page 410: "The services of two public employees have been terminated because of their refusals to answer questions relevant, or not obviously irrelevant, to an inquiry by their supervisors *into their dependability*. When these two employees were discharged, they were not labeled 'disloyal.' They were discharged because governmental authorities, like other employers, sought to satisfy themselves of the dependability of employees in relation to their duties. Accordingly, they made inquiries that, it is not contradicted, could in and of themselves be made. These inquiries were balked. The services of the employees were therefore terminated.

"Because the specific questions put to these employees were part of a general inquiry relating to what is compendiously called subversion and to conduct that on due proof may amount to disloyalty, every part of the process of inquiry is given the attribute of an inquiry into disloyalty and every resulting severance from service is deemed a finding of disloyalty. The argument runs, in essence, that because such an inquiry may in certain instances lead to a determination of disloyalty, the refusal to answer any questions in this process and dismissal therefor themselves establish disloyalty. To make such an attribution to a State, to draw such an inference from a carefully limited exercise of state power, to disallow state action because there are those who may draw inferences that the State itself has not drawn and has avoided drawing, is a curbing of the States through the Fourteenth Amendment that makes of that Amendment an instrument of general censorship by this Court of state action."

Furthermore, appellee's argument is clearly unrealistic. Any teacher who refuses to answer the Superintendent concerning questions pertaining to whether he was a sex pervert, or a purveyor of narcotics, or has committed a robbery, arson, rape, or murder, could and should be dismissed as a teacher. But Communism is far worse. The above mentioned crimes clearly and obviously relate to a teacher's fitness and competency, yet the commission of any one of those crimes would injure only one or a very few persons. On the other hand, Communism makes a teacher far more unfit and incompetent than any of the above mentioned crimes because it would destroy and enslave not one or a few persons, but over one hundred and fifty million Americans. Communism by its teachings and even more strikingly by its acts and deeds is the mortal enemy of our Country. Communism is not merely a political belief like the peaceful advocacy of socialism, or democracy, or republicanism, or any share-the-wealth plan, or the abolition of Congress and the substitution of an oligarchy or of a dictatorship. Communism is a world wide revolutionary movement to overthrow by force, violence, subversion, sabotage, strikes, insurrections, revolution and, whenever necessary, war, the Government of every other nation and to establish an atheistic Communist dictatorship therein. Obviously, a teacher who refuses to answer his Superintendent's questions pertaining to his present and past Communistic membership, activities or associations, is unfit and incompetent to be a teacher of our youth.

On the second issue involved, the court below held that even if the *Beilan* case is good law, Soler did answer the sample question and did not refuse to answer similar questions. What he did was, as above stated, to ask that before he was required to answer similar questions he be permitted the opportunity of consulting counsel. That request

was refused, and *Soler then refused to answer further questions relating to his loyalty.*

Soler was not on trial for a criminal offense or a Peckham Act offense nor was he before a Congressional investigating committee. He was here being questioned by his administrative superior in private. He has no right to be represented by counsel or to demand a list of questions to be asked, *when questioned by his employer to determine his competency.* To contend that a teacher can insist that a professional interview with his superior *shall be conducted only on the teacher's terms* is unreasonable and ignores and *effectually negates* the relationship between teacher and superior. Soler's refusal to answer his administrative superior was unjustified and is ground for a finding of incompetency.

Judgment reversed and the decision of the Superintendent of Public Instruction is reinstated.

Mr. Justice Jones concurs in the result.

Mr. Justice Cohen files a dissenting opinion.

Dissenting Opinion

Cohen, J.

I dissent from the opinion of the majority because it is contrary to the law of this Commonwealth.

This matter is the third in a series of so-called "Communist-Teacher" cases which this court has been called upon to decide in the last five years. In *Board of Public Education School District of Philadelphia* v. *Beilan*, 386 Pa. 82, 125 A. 2d 327 (1956), we held that the refusal of a school teacher to answer the questions of his administrative superior concerning alleged Communist activities establishes the teacher's professional incompetency within the meaning of the Public School Code of 1949, Act of March 10, 1949, P. L. 30, 24 P. S. § 11-1122. This decision was affirmed by the United States Supreme Court at 357 U. S. 399, 409, 2 L. Ed. 2d 1414, 1433, 78 S. Ct. 1317, 1324 (1958) on the ground that the interpretation given by this court to "incompetency" was not inconsistent with the Due Process Clause of the Fourteenth Amendment. This case was effectively overruled, however, by our recent decisions in *Board of Public Education* v. *Intilla*, 401 Pa. 1, 163 A. 2d 420 (1960); and *Board of Public Education* v. *Watson*, 401 Pa. 62, 163 A. 2d 60 (1960). In *Intille*, we said that the refusal of a public school teacher to answer questions in a hearing before a Congressional committee, in reliance upon the privilege against self-incrimination guaranteed by the fifth amendment did *not* constitute incompetency or evidence of incompetency within the meaning of the Public School Code, and such exercise of a constitutional privilege is *not* cause for dismissing a teacher. Similarly, in *Watson*, we held that the refusal to answer questions before a Congressional committee under the first amendment of the federal constitution did not constitute incompetency or evidence of incompetency within the Code, and that the dismissal of the school teacher was improper.

Dissenting Opinion

The *Intille* and *Watson* opinions were both written by former Chief Justice Charles Alvin Jones who had previously dissented in *Beilan*. In *Intille*, the court per former Chief Justice Jones stated at 21-23:

> "For a public school teacher to plead a constitutional privilege in appropriate circumstances does not prove teacher's incompetency within the intended scope of that term as used in our Public School Code. The plea is not even relevant as evidence of incompetency. Just as remaining mute, upon a plea of the Fifth Amendment, carries no implication of guilt of the matter inquired about in the unanswered questions (see *Slochower v. Board of Higher Education of New York City*, 350 U. S. 551, 100 L. Ed. 692, 76 S. Ct. 637 (1956)), so also does the plea not carry an implication of the pleader's *incompetency*. Nor is it of any materiality to a question of the pleader's competency whether or not the propriety of the plea against self-incrimination is conceded or rejected by the inquiring body so long as the plea is made in good faith and is not plainly frivolous.
>
> ". . . *If the refusal to answer a particular question is to be made a basis for the discharge of a professional employee, the question should, obviously, have for its purpose the eliciting of information concerning some matter material to the fitness of the employee to continue at work. This is so whether the question propounded be by a Congressional committee or by the Board of Education itself. And, if the only material matter to which the question relates is possible disloyalty or subversion on the part of the employee, then any proceeding looking to his dismissal for refusal to answer questions relating to his possibly disloyal or subversive activities or affiliations must be brought under the Pennsylvania Loyalty Act of December 22, 1951, P.L. 1726, 65 P. S. § 211 et seq.* [Pechin Act].

. . . What the Board of Education attempted to do in these cases is to avoid the requirement of the Pennsylvania Loyalty Act that disloyalty or subversion, as a ground for the discharge of a public school teacher, must be proven by a fair preponderance of the evidence.' The Board's action evidences a belief that it has found a way to dismiss, without any evidence at all, teachers whom it suspects of disloyalty or subversion. *Anything in the Beilan case to the contrary is herewith overruled for the future. In searching out and eliminating disloyalty or subversion among teachers in public schools the procedures of the applicable statute enacted for that purpose must be faithfully pursued, and violence must no longer be done the meaning of the word 'incompetency' in order to circumvent the procedures of the Loyalty Act.*"

Similarly, in *Watson*, the former Chief Justice said at p. 70:

> "[A] teacher's refusal to answer questions touching her loyalty does not constitute 'incompetency' within the meaning of that term as used in the Public School Code of 1949 and that any proceeding looking to the dismissal of a teacher with tenure for alleged disloyalty must be brought and proceeded with under the provisions of the Pennsylvania Loyalty Act of December 22, 1951, P. L. 1726 (65 P. S. § 211 *et seq.*).

Consequently, less than two years ago, this court specifically held that, Beilan notwithstanding, incompetency under the Public School Code does *not* include the refusal to answer questions concerning loyalty to either a legislative investigating committee or the administrative superior. If the Board of Education is concerned with the question of an employee's loyalty, let it invoke the proper administrative procedure provided by the Pechin Act, with its requirement that the appointing authority must establish by a fair pre-

ponderance of the evidence that the accused is subversive. Indeed Section 13 of the Act of March 21, 1806, P. L. 558, 4 Sm. L. 326, § 13, 46 P. S. § 156 provides that "in all cases where a remedy is provided or duty enjoined, or anything directed to be done by any act or acts of assembly of this Commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect." This court has reiterated this provision on many occasions: see, *eg. Jacobs v. Frazer*, 381 Pa. 262, 265, 112 A. 2d 356 (1955); *Collegeville Borough v. Philadelphia Suburban Water Company*, 377 Pa. 636, 645, 105 A. 2d 722 (1954).

Here again, the Board of Education contends that the hearings were concerned only with incompetency, not disloyalty. The facts, however, convincingly refute this assertion. At trial the superintendent of the public school system testified that the purpose of his interview with Soler was to ask him questions concerning certain information which had a bearing on appellee's loyalty. Indeed, the sample question given to Soler was whether he had been an active Communist in 1952. In this regard, Justice (now Chief Justice) Bell's dissenting opinion in *Beilan* is relevant. He stated: "We cannot shut our eyes to the inescapable fact which we are convinced—notwithstanding the earnest, able, argument of counsel for the Board—is glaringly disclosed by this Board, that Beilan was fired because the Board believed he was a Communist." 386 Pa. at 110-111.

This court altered in *Iutille* and *Watson* the interpretation of "incompetency" which it had previously given in *Beilan*. It is unfortunate that in less than two years we see fit to reinterpret it in a case where the facts are quite similar to those in the overruled *Beilan* case, and thereby cause confusion where clarity once reigned.

Dissenting Opinion

In our fight against Communism, we must not fall into the practice of resorting to the very methods of our enemies. Our decisions must be governed not by the temper of times but by a rigid adherence to our federal and state constitution and to statutory enactments. As this court stated in *Schlesinger Petition*, 367 Pa. 476, 483, 81 A. 2d 316 (1951), "It need hardly be stated that this Court is as opposed to communism in all its manifestations as the respondent Judge who instituted these contempt proceedings. But it is our sacred duty to uphold the Constitutions and laws of our Country and State and their provisions as to due process of law. What the Judge has done, in his zeal against communism, is to adopt the detestable method employed by communists themselves in arbitrary and unjudicial proceedings contrary to all our cherished traditions of law and legal procedure."

When we shut our eyes to the inescapable fact that Soler was discharged for failure to answer questions at a *loyalty* proceeding and not at an incompetency hearing, we do violence to the very institutions we seek to protect.

DECISION AND ORDER

Judgment reversed and the decision of the Superintendent of Public Instruction is reinstated.

BELL, C. J.

Mr. Justice Jones concurs in the result.

Mr. Justice Cohen files a dissenting opinion.

December 29, 1961.

Appendix B

Constitutional and Statutory Provisions Involved

Fourteenth Amendment—Due Process Clause.

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * * U. S. C. Const. Amdt. 14.

Pennsylvania Education Law
Causes for Termination of Contract

The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employe shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, persistent and wilful violation of the school laws of this Commonwealth on the part of the professional employe: Provided, That boards of school directors may terminate the service of any professional employe who has attained the age of sixty-two.

Nothing within the foregoing enumeration of causes, shall be interpreted to conflict with the retirement of professional employes upon proper evidence of disability, or the election by professional employes to retire during the period of voluntary retirement, or the authority of the board of school directors to require professional employes to retire during said period of voluntary retirement, or the compulsion on the part of professional employes to retire at the attainment of age seventy. 1949, March 10, P. L. 30, art. XI, § 1122; 1949, May 9, P. L. 939, § 1. 24 Purdon's Pa. Stats. Ann. § 11-1122.

Investigations

Any appointing authority may at any time, upon written complaint, investigate any person, including teachers and

other employes of the public school system, appointed or employed by him, to determine whether he is a subversive person. If, upon any investigation, it appears that such person is a subversive person, the person shall immediately be privately and confidentially notified of the recommendation by the appointing authority. No public announcement, release, statement or comment concerning the investigation, recommendation or notification shall be made by the appointing authority in any way whatsoever, unless and until the person so notified is discharged under section seven of this act. 1951, Dec. 22, P. L. 1726 § 6. 65 Purdon's Pa. Stats. Ann. § 216.

Hearing Before Appointing Authority

Any person, including teachers and other employes of the public school system, who has been so notified under this act, shall have a right to a hearing before the proper appointing authority within thirty (30) days after receiving said notification. If no hearing is requested within thirty (30) days after said notification is received, the person shall immediately be discharged by the appointing authority. He may appear before such appointing authority personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf through witnesses. The person who has been so notified shall at the same time be further informed in writing of such hearing, at least ten days before the day set for the hearing, and shall be informed therein of the nature of the charges against him; and the person who has been so notified shall be informed in the notice (1) of his right to reply to such charges in writing within ten days after the date of service, (2) of his right to a hearing on such charges before the appointing authority, which hearing may be private and confidential or may be public, at the option of the person so noti-

fied, and (3) of his right to apear before such appointing authority personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his own behalf through witnesses. If, after due hearing, it is determined by the appointing authority by a fair preponderance of the evidence that the person who has been so notified is a subversive person, as defined in this act, the person who has been so notified shall be discharged; otherwise, the recommendation shall be ignored. Said determination shall be made within sixty (60) days after the hearing. If the appointing authority shall be comprised of three or more members, a vote of two-thirds of the members shall be necessary in order to discharge a person. 1951, Dec. 22, P. L. 1726, § 7. 65 Purdon's Pa. Stats. Ann. § 217.

Appeal to Court of Common Pleas

When appeal is taken from the decision of the Superintendent of Public Education to the Court of Common Pleas * * * the judge of the court * * * shall fix a date for hearing by the court * * *. If the professional employe aggrieved shall so request in his petition, such hearing shall be de novo. * * * 1949, March 10, P. L. 30, art. XI, § 1132(b). 24 Purdon's Pa. Stats. Ann. § 11-1132(b).

Appendix C

Extracts from Appeal to Court of Common Pleas

12. The Adjudication is erroneous in holding that a professional employee of a school district may be dismissed upon a charge which alleges "violation of the School Laws", without setting forth any provision of the School Laws or any regulation thereto alleged to have been violated. Such holding is contravention of the School Code, of the Due Process provision of Article 1, Section 9, of the Constitution of the Commonwealth of Pennsylvania and the Due Process provision of the Fourteenth Amendment of the Constitution of the United States.

13. The Adjudication is erroneous in its holding that there is evidence in this record of incompetency on the part of appellant.

14. The Adjudication is erroneous in its holding that without any specific and clearly defined authority in the Statutes of the Commonwealth or valid regulations issued pursuant thereto, a professional employee of a school district may be dismissed for refusal to answer questions of the Superintendent of Schools in relation to his associations or beliefs, past or present. Such holding violates the School Code of the Commonwealth, the Due Process provision of Article 1, Section 9, of the Commonwealth, it violates the provisions of Article 1, Section 4, of the Constitution of the Commonwealth, and violates the Due Process provision of the Fourteenth Amendment to the Constitution of the United States.

15. The Adjudication is erroneous in its holding that, having received a categorical denial by appellant, that appellant had been a member of the Communist Party in January 1952, the Superintendent of Schools was justified or author-

ized in entering upon further questioning while denying to the appellant the right to have counsel advise him as to the propriety and legality of the questioning.

16. The Adjudication is erroneous in holding that the requirements of the Public School Code requiring a full hearing were complied with by the hearing granted him as set forth in the official record thereof.

17. The Adjudication is erroneous in that it deprives appellant of property rights, accumulated through many years of service, in accordance with the contract existing between the parties, consisting inter alia of retirement benefits and collateral benefits, in proceedings in which not one scintilla of evidence was adduced in derogation or diminution of appellant's concededly unblemished pedagogical, personal and civic record. The procedure adopted deprives appellant of the protections of Section 1122 and 1123 of the School Code of 1949, as amended, and of the rights guaranteed him by Article I, Section 9, of the Constitution of this Commonwealth, and of the Due Process provision of the Fourteenth Amendment to the Constitution of the United States.

18. The Adjudication is erroneous in that it affirms as a requirement of continued enjoyment by appellant of statutory and contractual rights of employment an unquestioning submission to interrogation as to past political or religious beliefs (not alleged then to have been unlawful), conducted apart from, and not purporting to be in pursuance of, any provisions of the School Code or of the Pennsylvania Loyalty Act, but in determined and obvious evasion thereof.

Appendix D

Excerpt From Petition for Rehearing Before Supreme Court of Pennsylvania

III. The dismissal of appellee was in violation of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution in that the record does not show that he was dismissed solely for failure to answer the Superintendent's questions.

* * *

IV. The dismissal of appellee was in violation of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution in that appellee did not receive reasonable notice that his failure to answer would be considered evidence of incompetency under the Teachers' Tenure Act of 1949.

* * *

V. The dismissal of appellee is in violation of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution since he was deprived of the right to counsel.